No. 83-1076

IN THE

Supreme Court of the United States

October Term, 1983

NATIONAL ENQUIRER, INC.,

Appellant,

vs.

CAROL BURNETT,

Appellee.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT.

APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE TO AFFIRM FOR LACK OF JURISDICTION, SUBSTANTIAL FEDERAL QUESTION, AND FRIVOLOUSNESS.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

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APPELLEE'S MOTION TO DISMISS OR IN THE ALTERNATIVE AFFIRM FOR LACK OF JURISDICTION, SUBSTANTIAL FEDERAL QUESTION, AND FRIVOLOUSNESS.

Carol Burnett ("Burnett"), Appellee, moves pursuant to Rule 16 to dismiss Appellant National Enquirer, Inc.'s purported appeal for want of jurisdiction, failure to present a substantial federal question, and frivolousness.

Alternatively, Burnett moves that the decision of the California Court of Appeal, Second Appellate District, be affirmed[1] as presenting no substantial issue requiring further argument or consideration.

Burnett further requests that in the event this Court considers Appellant's Statement as to Jurisdiction ("Stmt.")

[1]This request should be viewed consistently with Appellee's continuing objection to the remittitur, as an affirmation of her right to proper damages, and not a waiver of her contention that the judgment of the Superior Court, as modified, granted appropriate relief.

as a Petition for Certiorari pursuant to 28 U.S.C. § 2103 (1982), such Petition should be denied for failure to demonstrate any significant conflict of authority.

INTRODUCTION.

Appellant National Enquirer urges two primary issues in its Statement as to Jurisdiction, one of which the Appellant itself, in briefs filed in another court, has admitted is an "abstract or academic" issue that is "hypothetical" and "not now ripe." These were the words used by Appellant, in litigation with its insurance carrier, to describe the status of the case at bar with respect to whether punitive damages, founded upon any statute, are now at issue in this case.

The other issue presented to this Court by Appellant, challenging the constitutionality and application of CAL. CIV. CODE § 48a (West 1982) ("§ 48a"), finds the National Enquirer urging the unconstitutionality of a retraction statute which the Appellant was found by the trial and appellate courts not to have complied with. The Enquirer contends that the trial and appellate courts, having classified it as a magazine and not a newspaper within the terms of § 48a, acted unconstitutionally. However, before that issue can be considered, the Enquirer must explain away the fact that since it was found not to have conformed to the terms and standards of § 48a, the Enquirer would not have been entitled to its limitations on damages even if it had been found to be a newspaper.

Thus, in a case where the trial court found that:

> "not only did Plaintiff establish actual malice by clear and convincing evidence, but she proved it beyond a reasonable doubt" (p. 53a);

and the California District Court of Appeal held that:

> ". . . while Appellant's representatives knew that part of the publication complained of was probably false

> and that the remainder of it in substance might very well be, it was *nevertheless determined to present to a vast national audience in printed form statements which in their precise import and clear implication were defamatory*, thereby exposing respondent to contempt, ridicule and obloquy and tending to injure her in her occupation. We are also satisfied that even when it was thought necessary to alleviate the wrong resulting from the false statements it had placed before the public, the retraction proffered was evasive, incomplete and *by any standard, legally insufficient*. [citations] In other words, *we have no doubt* the conduct of appellant respecting the libel *was reprehensible and was undertaken with the kind of improper motive which supports the imposition of punitive damages*;" (pp. 25a-26a) (*emphasis added*)

the National Enquirer seeks to present issues for jurisdiction to this Court which not only are without substantive merit, but are also essentially moot.

THE SIGNIFICANCE OF CIVIL CODE § 48a.

It is ironic that the Enquirer, having been judged by clear and convincing evidence to be beyond the sanctuary of the First Amendment protections established by *New York Times v. Sullivan*, 376 U.S. 254 (1964), now seeks last refuge within the embrace of the California retraction statute, one of only two in the country[2] which afford protection to the intentional and malicious libeler. *Werner v. Southern California, etc. Newspapers*, 35 Cal.2d 121, 134; 216 P.2d 825, 833 (1950), *appeal dismissed on motion of appellant*, 340 U.S. 910 (1951). § 48a completely insulates a newspaper[3] *from any general or punitive damages* (includ-

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[2]*See also* NEV. REV. STAT. § 41.336, the only other such statute of which Appellee is aware.

[3]§ 48a also applies to radio; CAL. CIV. CODE § 48.5 (West 1982) applies to television.

ing non-quantifiable but provable injury to reputation) if the plaintiff does not timely demand a retraction (which she indisputably did in this case), or if, after a demand, the defendant retracts as conspicuously as the original libel within three weeks after the demand. Moreover, if a newspaper fails to publish a proper or timely retraction, it is still protected from punitive damages unless the plaintiff proves that the libel was promulgated with actual malice, which is defined as hatred or ill will toward the plaintiff without a good faith belief in the truth at the time of publication. (pp. 68a-70a).

As appears in detail from the challenged opinion, California has traditionally and rationally excluded non-newspaper publications because the legislature intended drastic limitations on libel remedies to inure only to the benefit of those "who, in good faith and without malice inadvertently publish defamatory statements" (*Werner*, *supra*, at 134; 216 P.2d at 833), who engage in publishing "news while it is new," (*Morris v. National Federation of the Blind*, 192 Cal.App.2d 162, 165; 13 Cal.Rptr. 336, 338 (1961)), and who "cannot always check their sources for accuracy and their stories for inadvertent publication errors." *Field Research Corp v. Superior Court*, 71 Cal.2d 110, 114; 77 Cal.Rptr. 243, 246; 453 P.2d 747, 750 (1969). This rationale is responsible for the recognition that two theoretically separate standards[4] for punitive damages exist depending upon "newspaper" or "non-newspaper" status. *DiGiorgio v. Valley Labor Citizen*, 260 Cal.App.2d 268, 274; 67 Cal.Rptr. 82, 87 (1968).

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[4]§ 48a hatred or ill will as opposed to CAL. CIV. CODE § 3294 (West 1970) ("§ 3294") conscious disregard. There may, as in this case, be no practical difference based on the evidence, when *New York Times* malice has been proved (by publication of a known falsehood) "beyond a reasonable doubt." (p. 53a).

APPELLANT'S RETRACTION ARGUMENTS ARE BARRED BY INDEPENDENT STATE SUBSTANTIVE AND PROCEDURAL GROUNDS.

As Appellant is aware, there are three hurdles which it must mount before it may even present its § 48a arguments to this Court.

1. The Court of Appeal, holding that Appellant's purported retraction was "by any standard, legally insufficient" (p. 25a), has determined that even if § 48a were constitutionally required to be applied, *the Enquirer did not comply with it*. Thus, Appellant's retraction does not entitle it to § 48a's protections. As a matter of law, based upon a binding evidentiary determination with unshakeable support in the record, there is an independent substantive state ground supporting the judgment.

2. Appellant's claims of unconstitutionality were not raised at the earliest opportunity or properly in the trial court, which is glaringly obvious from the Enquirer's total and purposeful non-compliance with Rule 15(g). Thus, a procedurally adequate independent state ground negates all § 48a constitutional arguments.

3. The evidence of actual malice in the sense of ill will is overwhelming, thus leading to the inescapable conclusion that even if § 48a were applied under new and different instructions, the result would not be different.

A. It Ill Befits Appellant to Complain About § 48a When It Did Not Satisfy the Legal Preconditions to Its Application as a Matter of Law.

Appellant's answer, filed in 1976, pleaded compliance with § 48a as an affirmative defense. (CT 76)[5] The trial court, concluding that the Enquirer was not within the pro-

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[5]To avoid a lengthy appendix to this motion, "CT" will be used to designate references to the Clerk's Transcript (documents) contained in the state appellate record. "RT" and "Ex." refer to Reporter's Transcript and evidentiary exhibits by number. Appellant may, in reply, reproduce any cited portions of the record should it take issue with Appellee's descriptions.

tections of § 48a, nonetheless passed on the sufficiency of the retraction in the context of mitigation of general and punitive damages, describing it as "half-hearted" with "a tendency to aggravate any reasonable person. . ." (p. 56a). Its pronouncement took the following form:

> "Preliminary to the subject of general and punitive damages is the question of whether defendant published an adequate correction since that is an issue relating to the mitigation of damages. In the present case, two critical questions must be answered:
>
> 1) Was the correction published with prominence substantially equal to the statement claimed to be libelous?
>
> 2) Did the correction without uncertainty and ambiguity honestly and fully and fairly correct the statement claimed to be libelous?
>
> The answer to both questions is in the negative." (p. 56a).

Judge Smith was duly impressed that at the time of the purported retraction, Appellant's President Calder "knew . . . that none of the libelous material . . . could be substantiated." (p. 57a) The fact that Calder denied falsity under penalty of perjury in Appellant's verified answer, served months after the retraction was published (CT 72, 81), obviously has not helped its position on appeal. The jury, presented with an instruction on retraction not challenged in any appeal in this case, obviously agreed with Judge Smith. (CT 1230-1231).

So did the Court of Appeal, which stated:

> "The retraction appeared as the eighth item of a ten-item gossip column, whereas the libelous item was contained as the fourth item. The headline to the gossip column containing the retraction failed to make any reference to the retraction although the defamatory item was highlighted by a large headline at the top of the

column. Even though the original defamatory item was further emphasized by its placement adjacent to a picture of Barbara Walters, the retraction was not placed next to a picture of a prominent celebrity. The purported retraction was also substantially shorter and occupied less column space than the original item. It repeated the substance of some of the defamatory statements while failing to refer to others. Most notably, it never stated that Carol Burnett was not inebriated. By inference it suggested that only the few published statements were false while the rest must have been true. It equivocated by ambiguously stating 'we understand' that the events did not occur."

It is against the backdrop of this record that Appellant baldly asserts it was deprived of its day in court on the issue of whether it, as a publication which had the luxury of weeks in normal operation to verify its materials, was entitled to the benefit of a statute designed to protect those who could not, from the nature of their media, take that long.

It is well established that a federal claim will not be entertained where the judgment rests on an adequate and independent state ground. *Webb v. Webb*, 451 U.S. 493, 500 (1981). Such is, beyond question, the instant case. Respondent is entitled as a matter of law to general damages of $50,000, and no federal claim can resurrect § 48a's retraction provisions to bar her right to seek exemplary damages. The disposition of Appellant's arguments as to the applicable standard for punitive damages, based upon independent state grounds, is discussed under those sections of this motion which relate to timeliness and the improbability of a different judgment should Appellant prevail.

THE ALLEGED UNCONSTITUTIONALITY OF § 48a IN ANY RESPECT WAS NOT RAISED TIMELY OR PROPERLY BELOW BY APPELLANT.

In 1976, the Enquirer and its counsel should have been aware, under general principles of California procedural law, that Appellant's affirmative defense of protection under

the retraction statute was deemed controverted. CODE CIV. PROC., § 431.20(b) (West 1973). Specifically, a substantial body of California law *then* held that magazines, by their publisher's choice, are not under pressure which would, as a practical matter, forbid sufficient time for verification. Magazines and other publications not under the time constaints of newspapers were thus not included within the protections of § 48a. (pp. 10a-13a). This body included at least one case which rejected an equal protection argument similar to that made today, and which undoubtedly sensitized the Enquirer to the subject. *Werner, supra*, at 130-134; 216 P.2d at 831-835. Not only did the plaintiff's First Amended Complaint, filed in July of 1976, describe the Appellant as a "newspaper or news magazine" (CT 54), but Judge Robert Weil's ruling of December 24, 1980, made it clear that the Enquirer's status as to protection under § 48a was at issue during trial. (CT 522-523). In the first days of trial, Appellant urged Judge Smith to decide the issue as one of law (p. 8a, n.4), which he did. Knowing full well that it could lose, Appellant made no argument of unconstitutionality of any kind, let alone one premised upon the Equal Protection Clause. At the critical hearing, as pp. 44a-51a demonstrate, not one claim of unconstitutionality was made in argument. Appellant's brief, filed at that hearing, is similarly devoid of such argument or citation. (CT 545-567). So is Appellant's general trial brief. (CT 586-631). Knowing that the court would instruct the jury other than in the terms of § 48a, Appellant filed no brief or motion for reconsideration prior to or during the instructions, *which were not given until days after the § 48a ruling*. After an entire day of argument on instructions, the best Appellant could do was offhandedly, without specifics, and for the first time mention in a brief sentence that it believed the statute violated Equal Protection guarantees. (CT 1342). It

made no motions, provided no authorities, requested no delay in instructing the jury and filed no briefs. This clearly falls within the proscription against dubious, hesitant or insincere presentations. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 763 (1946). The first time any issue was seriously raised was after the trial and verdict in a motion for new trial, and this was only of facially unconstitutional underinclusion, to be repeated before the Court of Appeal but not seriously argued here. All other § 48a arguments were raised for the first time on appeal.

It is hornbook procedural law in California that constitutional questions "must be presented at the earliest opportunity" or waived. *Geftakys v. State Personnel Board*, 138 Cal.App.3d 844, 864; 188 Cal.Rptr. 305, 317 (1982); *Bidart Brothers v. Elmo Farming Co.*, 35 Cal.App.3d 248, 263; 110 Cal.Rptr. 819, 828 (1973). As noted in *Estate of Crane*, 73 Cal.App.2d 93, 101-102; 165 P.2d 940, 944 (1946), a case containing appropriate language but involving a substantially greater lapse of time:

> "[T]he question of constitutionality, if any there was, must have been as fully apparent [then] . . . Nor is any claim made that this matter could not have been discovered and presented at an earlier date.
>
> * * * * * *
>
> "[W]hen appellant did finally take exception . . . [there was] no assertion that the section in question was unconstitutional . . . If the appellant then had in mind the constitutional question so extensively argued in the briefs, it is indeed strange that such an important objection should not have been *positively and concretely presented to the trial court*." (*emphasis added*).

The Court of Appeal and the California Supreme Court, both confronted by the Enquirer's arguments, silently declined to reach the merits after being reminded by Respon-

dent of the timeliness issue.

This Court requires rigor in the application of its law mandating timely and adequate presentation of federal claims below. Such presentation aids in developing the record needed to adjudicate the federal issue, and insures that if there are adequate and independent state grounds which would pretermit the federal issue, they will be acted upon. In *Webb, supra* at 501, it is in that context succinctly stated:

> "At the minimum . . ., there should be no doubt from the record that a claim under . . . the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law."

In the absence of a showing of adequate presentation, there is no jurisdiction (*Id.* at 497-498), and hence no jurisdiction here on any § 48a Equal Protection or vagueness claims.

EVEN IF § 48a GOVERNS, PUNITIVE DAMAGES WERE PROPERLY AWARDED, THUS RENDERING THAT ISSUE MOOT.

Appellant maintains that invocation of § 48a(4)(d)'s "ill will" requirement in the trial court would have insulated it completely from punitive damages, as plaintiff ostensibly cannot prove ill will. (Stmt., p. 8). It would therefore have this Court reverse with directions to enter an order that no punitive damages can be awarded, or alternatively reverse for retrial under new § 48a instructions as to whether any such damages may be awarded. The Enquirer apparently seeks to persuade this court that its time and effort in reviewing the question will likely produce a different judgment or a significantly different result. Such a perspective is neither justifiable nor rational.

The Enquirer fails to explain how its publication, with knowing falsity in part and with serious doubt as to truth

in part, of "statements which in their precise import and clear implication were defamatory" (p. 25a), which conveyed ridiculous, boorish, drunken and generally objectionable conduct, and which were contained in an article "libelous on its face" (p. 27a), a conclusion which to all is "abundantly clear" (p. 27a), is evidence of conduct motivated by other than ill will. Indeed, it defies logic to argue that publication of a false article, with constitutional malice, which reflects in an obviously derogatory way on its subject, is not strong circumstantial evidence of the *ill will* required by § 48a should it apply. As stated in *Fopay v. Noveroske*, 31 Ill.App.3d 182, 197-198; 334 N.E.2d 79, 92 (1975):

> "[W]e believe that conduct sufficiently reckless to satisfy *New York Times evidences ill will* and wanton disregard of the effect of the libel upon the plaintiff and satisfied common law malice requirements which will sustain an award of punitive damages." (*emphasis added*)

See also, *Bindrim v. Mitchell*, 92 Cal.App.3d 61, 74-75; 155 Cal.Rptr. 29, 36-37 (1979), *hg. denied* (1979), *cert. denied* 444 U.S. 984 (1979), *rehearing denied* 444 U.S. 1040 (1980) (*New York Times* malice, without more, sufficient in public figure libel case for punitive award).

The necessity of ill will often being proven by circumstantial evidence is not new to California. Defendants seldom talk with any degree of candor about precisely what was on their mind at the time of publication. Hatred or ill will is therefore provable "by indirect evidence." *Davis v. Hearst*, 160 Cal. 143, 160; 116 P. 530, 538 (1911). California courts have therefore traditionally permitted malice in fact to be proven by:

> "the circumstance, if it be found to exist, of wanton recklessness and heedlessness of plaintiff's rights."

Scott v. Times Mirror Co., 181 Cal. 345, 362; 184 P. 672, 680 (1919). In the latter case, it is stated authoritatively:

> "[W]here punitive or exemplary damages are sought in an action for civil libel, any evidence . . ., having logical tendency to prove that the publication was prompted by actual malice, is material, competent and relevant . . . [I]f there was any question about the state of our law, there is none now.
>
> * * * * * *
>
> "The plaintiff has to show what was in the defendant's mind at the time of the publication, and of that no doubt the defendant's acts and words on that occasion are the best evidence."

Scott, supra at 362; 184 P. at 681.

Not only can ill will be proven by constitutional malice (*Fopay, supra*) and recklessness or heedlessness (*Scott, supra*), which is "ill will's equivalent" (*A.B.C. Needlecraft Co. v. Dun & Bradstreet, Inc.*, 245 F.2d 775, 777 (2d Cir. 1957)), but also by the failure to publish a proper retraction (*Turner v. Hearst*, 115 Cal. 394, 402-403; 47 P. 129, 132 (1896)), exaggerated, colored or overdrawn language (*White v. State of California*, 17 Cal.App.3d 621, 639; 95 Cal.Rptr. 175, 180 (1971)), and failure to properly investigate (*DeRonde v. Gaytime Shops*, 239 F.2d 735, 738-739 (2d Cir. 1957)), all of which are in evidence here. Moreover, evidence of Appellant's employees' acts and language (*Scott, supra*) reveals that the Enquirer was unequivocally told plaintiff was "specifically, emphatically" not drunk (RT 340-341, 325), that defendant was aware the story was not confirmed (RT 700, 704, 706), that defendant was critical of its employees because the story was not being confirmed (RT 502), that defendant knew there was no argument or row as stated in the headline (RT 725, 743), that defendant thought the story was "gross" and would probably have to

be "cleaned up" (RT 437), that defendant wanted to run the story (RT 489), and that defendant's employees agreed that its source for the story could not be trusted. (RT 436).

Aside from this and other evidence of equal weight too voluminous to mention, there was fabrication.

> "The acts of fabrication and reckless disregard by Brian Walker are both clearly proscribed by California Civil Code Section 3294." (p. 59a).

Of course, actual malice can always be proven by knowing publication of a falsity. *Davis, supra* at 167; 116 P. at 542 ("conclusive evidence"); *DiGiorgio Fruit Corp. v. AFL-CIO*, 215 Cal.App.2d 560, 574; 30 Cal.Rptr. 350, 358 (1963) ("conclusive"); *Roemer v. Retail Credit Co.*, 3 Cal.App.3d 368, 372; 83 Cal.Rptr. 540, 543 (1970) (even "apparent to laymen"); *MacLeod v. Tribune Publishing Co.*, 52 Cal.2d 536, 552 n.3; 343 P.2d 36, 45 (1959) (that fabrication suggests bad faith is "inescapable"). These authorities are in general line with punitive damage and conditional privilege cases throughout the United States on the subject of knowing publication of falsity. *Morgan v. Dun & Bradstreet, Inc.*, 421 F.2d 1241, 1242-1243 (5th Cir. 1970) ("proof of malice" — punitive award upheld); *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.*, 430 F.2d 38, 47 (5th Cir. 1970) ("That was . . . strong evidence of malice"); *Durso v. Lyle Stuart, Inc.*, 33 Ill.App.3d 300, 306; 337 N.E.2d 443, 448 (1975); *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo.App. 817, 832; 73 S.W.2d 438, 446 (1934). Perhaps the statement of the court in *Warren v. Pulitzer Publishing Co.*, 336 Mo. 184, 210; 78 S.W.2d 404, 418 (1934) sums it all up:

> "Proof of the falsity of the facts and knowledge of such falsity is proof of actual malice [citation], because *that does, unquestionably show a wrong motive*." (*emphasis added*).

Given these authorities, the strong facts, proof of constitutional malice beyond a reasonable doubt, and the Court of Appeal's statement, it had "*no doubt*" (p. 25a) that Appellant had "the kind of improper motive which supports the imposition of punitive damages" (p. 26a), is there any doubt *that Appellant actually proved ill will*?

Improper motive having been established, under the California Constitution and statutes which require a miscarriage of justice, there was no conceivable ground for reversal based upon an allegedly improper punitive damage instruction.

> " 'The short answer to this contention is that, assuming arguendo that failure to give such instruction was error, it is not reasonably probable that a result more favorable to defendant would have been reached in the absence of error. (citations)' "

Agarwal v. Johnson, 25 Cal.3d 932, 951; 160 Cal.Rptr. 141, 151; 603 P.2d 58, 68 (1979); *See also* CAL. CONST. art. VI, § 13; CODE CIV. PROC. § 475 (West 1973).

There is thus a clear, adequate and independent state substantive ground, *the proven and established existence of actual ill will*, which moots defendant's contentions. There is also an independent state procedural ground, the harmless error doctrine, even if defendant's arguments have technical merit. In either case, there is no jurisdiction.

THE EQUAL PROTECTION ARGUMENTS ARE UNMERITORIOUS.

Appellants argue that § 48a is under-inclusive and is administered capriciously, though regular on its face.

The first argument is without substance. *Werner, supra* at 130-134; 216 P.2d at 831-835, *appeal dismissed on motion of appellant*, 340 U.S. 910 (1951); *Jefferson v. Chronicle Publishing Co.*, 108 Cal.App.2d 538; 238 P.2d 1018,

appeal dismissed for want of a substantial federal question, 344 U.S. 803 (1952), *rehearing denied* 344 U.S. 882 (1952); *Werner v. Hearst Publishing Co.*, 297 F.2d 145, 149 (9th Cir. 1962); *Anderson v. Hearst Publishing Co.*, 120 F. Supp. 850, 852 (S.D.Cal. 1954).

This opinion's rationale of what constitutes a newspaper makes the claim of invalidity even less tenable, because its test is focused on the reason for the statute, and not on what in popular concept or appearance is a newspaper. Appearances, as in the case of the Enquirer, can be misleading. The statute protects publishers who cannot, because of the demand to rapidly disseminate news and the short time lapse from its acquisition, reasonably verify their material, while denying protection to those who, as a matter of free choice, have pursued a course of business which permits ample time. Appellant does not explain how such a test creates arbitrary or unreasonable classifications, because the test does not, and Appellant cannot.

To prove capricious administration, Appellant cites cases prior to this opinion as "holdings" which show, in its opinion (Stmt., pp. 11-12), inconsistent application. To describe these opinions as "holdings," when they do not even rise to the dignity of dicta, is simply incorrect. *Not one* involved an evidentiary hearing, findings of fact, or even a discussion of what was and was not, in theory, a newspaper for purposes of § 48a. Those which Appellant claims involved columnists, authors, critics and editorials (Stmt., p. 12) all involved publications *assumed, but never decided to be*, newspapers. Those which Appellant claims involve *The Saturday Evening Post, Reader's Digest* (Stmt., p. 11), or books (Stmt., p. 12) have all been expressly criticized as not having discussed the issue in published opinions relied upon by Respondent. The case of *Faan v. National Enquirer*, 2d Civ. 51523, March 13, 1978, cited by Appellant,

was *specifically ordered unpublished* by the California Supreme Court pursuant to Rule 976 of the California Rules of Court, has no force or authority under California law, and also fails to discuss what is a newspaper under the retraction statute. Moreover, under Rule 976, it is specifically *prohibited from being cited*. Decertification orders are generally reserved for opinions which do not correctly state the law or are otherwise unacceptable.

Three of the opinions upon which Respondent and the California Court of Appeal rely have been in effect reviewed upon petition for hearing to the California Supreme Court.[6] These authorities are particularly precedential, because they discuss and analyze all previous cases, discuss the rationale of the statute, criticize prior California Supreme Court dicta and even predict the way the Court would rule on the issue. This case clears up any confusion in California law, adopting and following the well-reasoned authoritative exposition of controlling principles contained in previous cases.

How is Appellant the victim of arbitrary and unlawful discrimination under a statute constitutional on its face (*Yick Wo v. Hopkins*, 118 U.S. 356 (1886)) because a court rationally reconciles previous cases and determines on the basis of authority, some predating the opinion by 22 years, that Appellant is not within the protections of § 48a? Appellant points to no case involving appellate construction of a statute where an "equal protection-discrimination as ap-

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[6]*Montandon v. Triangle Publications, Inc.*, 45 Cal.App.3d 938; 120 Cal.Rptr. 186 (1975), *h'g. denied* (1975), *cert. denied* 423 U.S. 893 (1975), discusses *Morris, supra*, and disapproves *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529; 93 Cal.Rptr. 866; 483 P.2d 34 (1971), heavily relied upon by Appellant, as dictum. The California Supreme Court took no umbrage and denied a hearing. *Alioto v. Cowles Communications, Inc.*, 519 F.2d 777 (9th Cir. 1975), *cert. denied* 423 U.S. 930 (1975), *Montandon* and *Morris* were all in effect reviewed by denial of a hearing in this case.

plied'' claim has been sustained using two ostensibly conflicting lines of authority as evidence. Perhaps that is why the argument was not raised in the trial court, Court of Appeal, or California Supreme Court. It is certainly consistent with Appellant's subtle attempt to suggest, without proof, and oblivious to this record, that it is a ''victim'' solely because it is the National Enquirer, and not because it acted reprehensibly.

THE UNCONSTITUTIONAL DISTINCTION ARGUMENT IS WITHOUT MERIT.

Appellant claims that a determination as to what is a newspaper for purposes of § 48a necessarily involves a Court's ''subjective impressions of newsworthiness of its content.'' (Stmt., p. 14). This statement is not an accurate reflection of the record.

The trial court's reasoning, based upon the reception of voluminous evidence, is found in its new trial order (pp. 54a-55a) and the transcription of oral argument. (pp. 44a-51a). Its comments, singularly and taken as a whole, show unwavering concern with the rationale and policy of the statute. (pp. 46a, 47a, 54a-55a) That policy, as explained and cited at length in the instant opinion (pp. 8a-9a; 10a-14a) and other authority on point (*Rudin v. Dow Jones & Co., Inc.*, 510 F. Supp. 210, 217 (S.D.N.Y. 1981); *Application of Cepeda*, 233 F. Supp. 465, 472-473 (S.D.N.Y. 1964)), clearly focuses on the ability of a publisher to verify its news within the time constraints afforded by the general type of business he has chosen. Thus *indicia of timeliness*, not substance or content, are the key. What is or is not news is irrelevant, the question being when articles are normally published with reference to when their subject matter first occurs.

For example, a story about a given event could be published in a daily, which would generally mean next day or day after dissemination. Thus, the event occurring on day 1 would be the subject of a story usually published on day 2 or day 3. It could be published in a weekly, which could, depending on the publisher's judgment, mean publication on day 2, 3, 4, 5 or 6. What Appellant purposefully overlooks is that it could also be published on day 7, day 13 or day 22, especially if the publisher has decreed a general lead time, as in this case, of one to three weeks (p. 7a) for most of its stories, and his organization functions predominantly within that framework.

Using the example of the daily, there would, based upon the general conduct of the business, be insufficient time for detailed investigation and verification. Given the example of a weekly which as a matter of policy publishes the bulk of its stories on day 22, there would be ample time for investigation and verification, and thus no need for the stringent protections and immunities of the retraction statute. Given the example of a weekly which publishes as a matter of policy anywhere between day 2 and perhaps day 10, there is a gray area in which it becomes a question of fact (*Vescovo v. New Way Enterprises Ltd.*, 60 Cal.App.3d 582, 587; 130 Cal.Rptr. 86, 88 (1976)) as to whether there is generally sufficient time to investigate and verify in the ordinary course of the business which the publisher has chosen.

Evidence of the publisher's normal policies in terms of lead time or time to verify clearly should be considered. This may but need not be found in the publication itself, in the form of the absence of attributions to wire services, the absence of references to time, and the absence of coverage of fast-breaking subjects. Direct testimony of those engaged in production may also be taken, as was done here with respect to lead time.

In combination, there was in this case direct testimony and documentation that Appellant did not call or consider itself a newspaper (Ex. 22, 23; RT 841-842, 938), did not attribute articles to wire services (RT 942), did not cover current subjects (p. 7a), did not make reference to recent time in its articles (p. 7a), competed with magazines for advertising (RT 966), did not generate news day to day (p. 7a), used a formula presentation including the same types of stories week after week (p. 7a) (clearly not dictated by hot news), had a "rush" about Respondent which languished in excess of a month before publication (Ex. 7), and had a volume of rushes which by testimony most favorable to Appellant constituted but 13% of its volume. (RT 1007-1008). Defendant's President testified to statistics showing 6%. (RT 569). On this evidence, Judge Peter Smith stated that the issue wasn't "even close". (pp. 47a, 49a).

Clearly, a judge passing on newspaper status neither censors content, nor is interested in content for content's sake, nor is he compelled to even read the publication. If he reads it at all, he is only interested in its reflections upon the sufficiency of time to verify facts in the normal course of business.

Paradoxically, the Enquirer would, for purported lack of standards, deny the right and ability of a court to determine what publication qualifies as a newspaper, based upon news while it is new, but would insist on its right to present evidence of "hot news" dissemination in the same libel action in order to thwart claims of constitutional malice under California (*Widener v. Pacific Gas & Electric Co.*, 75 Cal.App.3d 415, 434; 142 Cal.Rptr. 304, 314 (1977), *cert. denied* 436 U.S. 918 (1978)), and federal law. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 157-159 (1966). Would defendant's weekly publication, containing stories which "happened" no earlier than 6 days prior, be inad-

missible at the Enquirer's behest as an unconstitutional inquiry into content?

All of Appellant's cited authorities are in areas of taxation, censorship or restrictions upon distribution. § 48a is involved with none. Appellant, fully disarmed notwithstanding the bastion of the First Amendment, seeks to employ free speech principles in striving for the stricter but unreachable protections of a state statute which involves neither the power to tax nor prohibit. Appellant can always change its lead time, coverage, or market if it desires to qualify for the statute. Otherwise, it can rest solely on what it must perceive to be the admittedly inferior clear and convincing evidence requirements of *New York Times* and publish anything it wants to anyone anywhere. There is hardly a cognizable chilling effect from being forced to such a choice.

THE VAGUENESS ARGUMENT IS WITHOUT MERIT.

Utilizing another argument it did not raise in the trial court or any previous appellate court, Appellant claims *unconstitutional vagueness* caused it to sacrifice its right not to print a retraction.

Appellant printed the retraction because, if it did not, and were later held to be a newspaper, it could not benefit from § 48a. It also undoubtedly printed the retraction to lay the foundation for a claim of mitigation of damages, which the trial judge subsequently renounced. Interestingly, the jury instructions on retraction were virtually identical to those which would be required by § 48a, except they require retraction within a reasonable time, as opposed to the three weeks prescribed by the statute.

Appellant, elevating estoppel to asserted constitutional dimensions, suggests it suffered "detriment" in its attempt to embrace § 48a. Its failure to retract, as a fabricator and

one which had acted with reckless disregard, would have left it completely exposed. No possible claim of mitigation, no § 48a protection, and conceivably aggravated punitive damages would have been the result. Yet its assertion of "detriment" from the alleged loss of an opportunity not to retract, an option that even an innocent publisher would not have exercised, is typical of the sheer arrogance of this tabloid. As the facts and opinion show, it did not, and did not intend to, retract properly in any event.

There is no issue of vagueness. The statute told Appellant what to do — yet it wilfully did not. Nowhere does Appellant complain that it didn't know how to retract because the statute was vague. It now asserts that it thought it was a newspaper, although California precedent 15 years and 1 year prior to the libel established the principles under which this court, based on the Enquirer's own operation, found it was not. How could any vagueness in terminology have caused Appellant to write a retraction insufficient even by common law standards of mitigation? More specifically, had it been a *newspaper* and *not retracted*, it still would be entitled to the hatred or ill will standard under § 48a, a consequence not affected one way or the other by an attempt to retract, or an insufficient retraction. What is Appellant's loss?

THE ENQUIRER'S CHALLENGE TO THE PROPRIETY OF A PUNITIVE DAMAGE AWARD IN A PUBLIC FIGURE LIBEL ACTION IS MERITLESS, HAS BEEN UNANIMOUSLY REJECTED BY ALL FEDERAL COURTS CONSIDERING IT, AND IS PARTICULARLY INCONGRUOUS IN THE FACTS PRESENTED.

A. Though Not so Advising This Court, the Enquirer Has Argued to the California Court of Appeal That the Very Question of Punitive Damages It Here Claims to Be "Substantial" Is Not Ripe for Decision and May Be Mooted.

The Enquirer's attack on punitive damages in this case is most peculiar as there is no award of punitive damages currently outstanding to attack. The California Court of

Appeal granted a new trial on the issue of the amount of punitive damages.[7] Thus, the state of record is that this matter is awaiting retrial on the issue of the amount of punitive damages.

This fact and its significance is well known to the Enquirer, which though failing to point it out to this Court, repeatedly stated it to the California Court of Appeal, Second Appellate District, in the matter of *Employers Reinsurance Corporation v. National Enquirer, Inc.*, 2d Civ. No. 69508. That matter is one between the Enquirer and its insurance carrier dealing with whether or not the carrier is obligated to reimburse the Enquirer for a punitive damage award in this case. In an effort to extend its time to file its opening brief,[8] the Enquirer argued:

> "*[T]here is now no outstanding punitive damage award in the Burnett case*" (*emphasis in original*) (Application, p. 1).
>
> * * * * * *
>
> "Since there is no outstanding punitive award in the Burnett case, the question of whether any such punitive damages can be indemnified involves at this time only 'abstract or academic questions of law [citation]'." (Application, p. 8).

The Enquirer further stated:

> "This Court should not be asked to resolve a hypothetical issue . . ." (Application, p. 4) "This appeal is thus not now ripe" (Application, p. 7).

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[7]The new trial order was conditioned upon Burnett's failure to accept within thirty (30) days after final remittitur to the Los Angeles Superior Court, a reduced punitive award of $150,000. Thirty (30) days elapsed and Burnett did not accept the reduced award.

[8]The papers to accomplish this were denominated: "Reply To Opposition To Application For An Order Extending Time To File Opening Brief" ("Reply") and "Appellant's Application For An Order Extending Time to File and Opening Brief" ("Application").

Before this Court, where the Enquirer seeks to characterize its punitive damage argument as "substantial", its contradictory argument in a setting where its interests were different is nowhere to be found.

Although there is currently no outstanding punitive damage award, the Enquirer proffers arguments ignoring still other salient features of this case. The Enquirer insists:

(a) That the trial judge was somehow "out to get it" because of its brand of journalism (Stmt., p. 25) (Ignoring that the trial judge on a motion for new trial *reduced* the punitive damage award from 1.3 million dollars to $750,000);

(b) That the California Court of Appeal was also "out to get it" by directing "that a publisher stand trial civilly solely for the purpose of determining punishment for a publication" (Stmt., p. 29) (Ignoring that the granting of the new trial was the very relief which the Enquirer sought and was only accorded if Burnett failed to accept the Court's drastic reduction in the punitive award from $750,000 to $150,000);

(c) That the balance of competing interests involved in a libel action should be moved further away from the individual's interest in privacy and reputation by requiring additional and higher standards in order to obtain punitive damages (Ignoring that *New York Times v. Sullivan* and its progeny has established the accommodation of these competing interests);

(d) That there is a First Amendment chill in imposing punitive damages in the libel context (Although the existence of any chill is unlikely in the facts of this case where "acts of fabrication and reckless disregard by Brian Walker" (p. 59a) make it obvious the decision was made to publish notwith-

standing knowledge of falsity or any uncertainty of the effect on Respondent, thus evidencing "reprehensible" journalistic conduct. (p. 26a));

(e) That there is a "threat of unlimited punitive damages" (Stmt., p. 24) (Though the reduction of the jury's 1.3 million dollars to $150,000 in this very lawsuit reflects aggressive and to a certain extent unwarranted checks upon such awards); and,

(f) That the "greatest danger . . . is that punitive damages will be used for arbitrary punishment of unpopular publishers and unpopular views" (Stmt. p. 25) (Although here, in the view of 11 trial and appellate judges and a unanimous jury, the Enquirer was punished not for any "unpopular views" but for the most flagrant violation of journalistic ethics; knowingly publishing lies. Furthermore, with 16 million readers (p. 32a), the Enquirer can hardly claim to be unpopular).

The constitutional ramifications of publishing a known falsehood have been appropriately commented upon by this Court.

> "Calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality . . .' [citation]. Hence, *the knowingly false statement, and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.*" *Garrison v. State of Louisiana*, 379 U.S. 64, 75 (1964) (*emphasis added*).

It is only for constitutionally unprotected and intentional lies that the Enquirer was subjected to punitive damages.

In light of the current procedural posture of this case and the substantial evidentiary justification for a punitive award under any standard, the facts here do not justify review.

B. Relying on This Court's Authorities, the Federal Circuit Courts Considering the Issue Have Unanimously Approved Punitive Damage Awards in Libel Cases.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), this Court stated:

> "[T]he states may not permit recovery of . . . punitive damages, . . . where liability is not based on a showing of knowledge of falsity or reckless disregard for the truth."

This statement has been construed by five federal circuit opinions, emanating from four different federal circuits, to imply that punitive damages may be permitted when actual malice is proven. *See, Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977); *Goldwater v. Ginzburg*, 414 F.2d 324 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1049; *Buckley v. Littell*, 539 F.2d 882 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Davis v. Schuchat*, 510 F.2d 731 (D.C. Cir. 1975); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976).

The logic behind permitting punitive damages in libel cases fully supports the implication in *Gertz*. Judge Duniway in *Maheu, supra*, stated:

> "It is important to safeguard First Amendment rights; it is also important to give protection to a person who was intentionally and maliciously defamed and to discourage that kind of defamation in the future. A balance must be struck between these two competing interests. The language in *Gertz* suggests that punitive damages may be allowed in a case such as this where actual malice has been established. California has chosen to allow such recovery and we find that the state's interest in deterring malicious defamation for the purpose of protecting privacy and reputation, even when public

> figures are involved, is compelling." 569 F.2d at 479-480.

California has therefore adopted the position that *New York Times* malice is sufficient in a public figure libel case, without a showing of hatred, to award punitive damages. *Bindrim, supra.*

Furthermore, since damages to reputation and loss of business opportunities resulting from a libelous publication are often difficult, if not impossible, to prove, punitive damages may, at least in part, serve to fully compensate libel plaintiffs and buttress the important state policy of § 3294 to encourage individuals to enforce rules of law and enable them to recoup the expense of doing so. *Grimshaw v. Ford Motor Co.*, 119 Cal.App.3d 757, 810; 174 Cal.Rptr. 348, 383 (1981). Thus, to the extent punitive damages are, in a sense, a windfall to plaintiffs,[9] they are less so in the context of a libel action.

C. § 3294 Is Not Unconstitutionally Applied at Bar.

The Enquirer contends that application at bar of § 3294, embodying California's general standard for recovery of punitive damages, is unconstitutional. In response to a similar constitutional attack on § 3294, in *Maheu, supra* at 480, the Court stated:

> "First, § 3294 is not vague or overly broad when applied in conjunction with the safeguards imposed by the *New York Times* line of cases, and specifically, *Gertz*. In addition, § 3294 merely codified the earlier California common law of punitive damages which 'specifically defines when exemplary damages may be

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[9]Punitive damages are of course not awarded with compensation to the Plaintiff in mind, but rather with an eye towards punishing the wrongdoer and deterring such future conduct by it and others similarly situated.

awarded and how the amount shall be determined.' [citation]. Moreover, any uncertainty as to the amount of permissible punitive damages in any specific case does not invalidate the statute. Fair warning concerning the specific conduct which is prohibited has been provided by relevant case law. The fact that the amount of a proper damage award may not be precisely known before trial does not make that award unconstitutional."

* * * * * *

"Finally, Summa argues that § 3294 violates the First Amendment by allowing excessive damage awards. California courts, however, require a reasonable relationship between the punitive damages and actual damages awarded. [citation][10] If an excessive amount is awarded, the court may reduce it by remittitur.[11] Sufficient safeguards against excessive punitive damages are therefore provided."

* * * * * *

"We conclude that punitive damages are permissible once actual malice as defined in *New York Times* has been established and that the statute is not overly broad or void for vagueness . . ."

See also Grimshaw, supra at 811; 174 Cal.Rptr. at 383 (unconstitutionality "repeatedly rejected").

Furthermore, despite the Enquirer's suggestion that the "conscious disregard" requirement of § 3294 is something less than the common-law hatred or ill-will prerequisite for punitive damages, California cases have unambiguously

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[10]The trial court in this case in fact instructed with respect to that reasonable relationship, and reduced the punitive damage award when it reduced the punitive award to comport with that relationship. (p. 60a).

[11]The court in this case availed itself of the option of remitting the amount of punitive damages from $1,300,000 to $750,000, and the California Court of Appeal further but unwarrantedly reduced the punitive damage award from $750,000 to $150,000.

concluded that § 3294 is nothing more than a codification of the common law standard. *Bertero v. National General Corp.*, 13 Cal.3d 43, 66; 118 Cal.Rptr. 184; 201; 529 P.2d 608, 625 (1974); *Maheu, supra*, at 480. Thus, for this Court to conclude that § 3294 is unconstitutional is nothing more than to invalidate all punitive damages in libel cases as provided by common law.

The Enquirer claims that mere showing of "conscious disregard" by the mere preponderance of the evidence is insufficient to justify punitive awards in public figure libel cases, and that "hatred or ill will must be demonstrated" (Stmt., p. 26). In addition to being unsupported in this Court's decisions, this argument is founded upon the faulty premise that hatred or ill will can only be proven by demonstrating subjective, personal animosity toward the plaintiff. However, ill ("bad" or "evil") will does not connote personal animosity and may be proved, as previously discussed, directly or indirectly by evidence of evil motive and intent.

THE APPEAL SHOULD BE DISMISSED SINCE IT IS FRIVOLOUS AND DILATORY.

As the foregoing sections of this Motion set forth, this Court should not accept this appeal since it raises no substantial federal issues for review. Taken only after the judgment had become final as to California courts and Appellee elected a retrial, it is simply an attempt by the Enquirer to pursue every possible legal theory to come within the ambit of § 48a or avoid punitive damages, no matter how unmeritorious. The Superior Court, confronted with this issue after the California Supreme Court denied hearing, apparently arrived at a similar assessment of this appeal, and declined to grant Appellant's request for a stay, notably not renewed before this Court.

The record on both the California punitive damage statute, § 3294, and the retraction statute, § 48a, is "so clear and well established that the [Enquirer's] position is simply untenable." *Maneikes v. Jordan*, 678 F.2d 720, 722 (7th Cir. 1982).

This is a clear case for the imposition of sanctions under Rule 49.2, and 28 U.S.C. § 1912 (1966) since the only apparent purpose of this appeal is to impose additional costs on Appellee. Her case will have been pending for 8¾ years at the time of the December 10, 1984 retrial, so scheduled after the Superior Court's inquiry into the time parameters of this Appeal.

CONCLUSION.

For the reasons set forth in the foregoing sections of this Motion, Appellee Carol Burnett respectfully requests that this Court grant her motion, or in the alternative, summarily affirm.

Dated: January 27, 1984.

Respectfully submitted,

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